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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELODIE PASSELAIGUE,

Plaintiff,

New York, N.Y.

v.

16 Civ. 1362 (VSB)

GETTY IMAGES (US), INC., et
al.,

Defendants.

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September 7, 2018
4:05 p.m.

Before:

HON. VERNON S. BRODERICK,

District Judge

APPEARANCES

THE LAW OFFICE OF JACK FITZGERALD, P.C.
Attorneys for Plaintiff

BY: MELANIE R. PERSINGER

COWAN DeBAETS ABRAHAMS & SHEPPARD, LLP
Attorneys for Defendants

BY: SCOTT J. SHOLDER

BY: MARISSA B. LEWIS

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(Case called)

THE DEPUTY CLERK: State your appearance for the record.

MS. PERSINGER: Okay. Melanie Persinger on behalf of plaintiffs.

THE COURT: For the defense?

MR. SHOLDER: Your Honor, Scott Sholder on behalf of the defendants.

MS. LEWIS: Marissa Lewis, also on behalf of defendants.

THE COURT: All right, thanks.

So, we are here to discuss, certainly particularly, discovery disputes. So, what I plan to do is go through, in essence -- well, are there any disputes that are now off the table?

MR. SHOLDER: No. I don't think so, your Honor.

THE COURT: So, what I plan to do is first address the issue of bifurcation, then address the discovery disputes that are -- I'm sorry, I didn't allow -- is that plaintiff's counsel's understanding also, that each of the discovery disputes are still live?

MS. PERSINGER: Yes, your Honor.

THE COURT: So, first I plan on discussing the bifurcation issue and then discussing each of the requests that are in dispute, basically going letter by letter.

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1 With regard to the most recent letters, 88 and 89,
2 however, I think that more discussion needs to happen between
3 the parties with regard to that. I'm not exactly sure what
4 actually happened, but it does seem to me that some additional
5 meet and confer with regard to those issues that were raised, I
6 guess it is in document 88 -- is it 88 --

7 MR. SHOLDER: Yes, your Honor.

8 THE COURT: -- that were initially raised. I think
9 some more discussion with regard to those would make sense so
10 I'm not going to address those today.

11 Now, with regard to the request for bifurcation, as I
12 understand it, it's to address the one issue and am I correct
13 the defendants, the proposal would be just to take, I think was
14 it three depositions in connection with that?

15 MR. SHOLDER: Your Honor, we actually, to date, have
16 taken the deposition of the plaintiff.

17 THE COURT: Okay.

18 MR. SHOLDER: We could potentially take a couple more
19 depositions of other witnesses to the signing of the model
20 release. It is our position, though, that we have other
21 evidence including previous witness statements that were
22 provided to plaintiff's counsel two years ago concerning
23 witnesses who were there at the time in 2009 that the model
24 release was signed that we could potentially use in connection
25 with the summary judgment motion but we haven't -- we still

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1 need to consider whether we want to take more depositions. It
2 wouldn't be many, though.

3 THE COURT: Let me ask this with regard to, because
4 again, I will tell you from my inclination it is not to have
5 bifurcation and I would exercise my discretion in that regard,
6 but out of a matter of curiosity, what was the plaintiff's
7 testimony about this specific issue that you contend would
8 resolve the matter?

9 MR. SHOLDER: The plaintiff had no recollection at all
10 of the signing of the model release.

11 THE COURT: Okay.

12 MR. SHOLDER: There are very detailed allegations in
13 the complaint and in the opposition to the motion to dismiss
14 concerning what happened, when it happened, and who was there,
15 and what was said to her. And, when asked, under oath, she
16 claimed to have no recollection of what happened or when it
17 happened or who said what to her.

18 THE COURT: Okay.

19 MR. SHOLDER: And our witness statements contradict
20 that and support our client's version of what happened and we
21 believe that deposition testimony also would support that side
22 of the story.

23 THE COURT: All right.

24 Again, while I understand that that is your position
25 that it would, it is not clear to me that there still wouldn't

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1 be issues of fact when it would come down to summary judgment
2 and that that would preclude the granting of summary judgment
3 on that. And, even with that, that necessarily this particular
4 defect in the plaintiff's claim would necessarily wipe out the
5 class allegations in light of, again, what I understand the
6 defects are.

7 So, in light of those two issues and my discretion in
8 the matter, I am going to deny the application motion to
9 bifurcate. There is no need to -- I think there was a -- there
10 may have been reference in the letter for further briefing. We
11 don't need to further brief it. I think I understand the issue
12 and so I am denying the request for bifurcation.

13 So, let's move now to the requests, and first which I
14 guess is document 69 which is the letter from the defendant
15 relating to, first, request 10, 11 and 13, I believe, and as I
16 understand it this is a request where the plaintiff had
17 indicated that documents are work product or privilege or
18 something like that.

19 I think in connection with this, and I will hear from
20 the parties, but what my inclination is -- well, let me ask
21 this first. Has a privilege log been produced?

22 MS. PERSINGER: Yes, your Honor.

23 THE COURT: Okay. In connection with that privilege
24 log, how many documents are we talking about that are on that
25 privilege log?

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1 MS. PERSINGER: I don't know offhand but I can pull it
2 up really quick.

3 MR. SHOLDER: I have a copy of it.

4 MS. PERSINGER: Notwithstanding the privilege log, the
5 privilege documents, we did produce 125 pages of e-mails with
6 potential class members so we did send documents and then
7 redacted some confidential information from those, some
8 privileged information from those and then logged others on our
9 privilege log.

10 THE COURT: Do you have a sense, with regard to this
11 specific issue in your request that we are talking about -- 10,
12 11, and 13 -- concerning, do you have a sense of how many
13 documents are implicated, in other words how many documents on
14 the privilege log relate to that?

15 MR. SHOLDER: Well, your Honor, we have a copy of the
16 privilege log in there, it looks like there were 47 entries.

17 THE COURT: Okay.

18 MR. SHOLDER: Some of them reference e-mail chains so
19 it could be potentially be more than 47 documents and of course
20 I will defer to plaintiff's counsel if she pulls it up.

21 I will just say that we have reviewed the privilege
22 log. We haven't had an exchange of letters about this but I do
23 believe there are a number of entries that are problematic and
24 that potentially, at least in our view, should be
25 de-designated.

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1 THE COURT: So, this is what I propose that we do.
2 Since you now have the privilege log, I will ask you --
3 obviously I don't know how long you have had it but it doesn't
4 sound like it has been all that long. Review it, make your
5 specific objections to the documents you believe are not
6 appropriately claimed as privilege or work product, and engage
7 in a meet and confer process. And then, once that's been
8 distilled, if there is still disagreement, I will make a ruling
9 on the specific documents at issue. But the parties should,
10 again, provide a joint letter indicating your respective
11 position with regard to each document and then I will make a
12 ruling on that.

13 I think in all likelihood I could probably -- well, I
14 will see once I get the letters whether I need to speak to the
15 parties or whether I can make a ruling based upon the letters
16 and the parties should also discuss whether or not they believe
17 it would be fruitful because, as I understand it, these are
18 documents that are being alleged to be work product. Is that
19 right? Or are some of them also attorney-client privilege?

20 MS. PERSINGER: Some of them are attorney-client
21 privilege and remainder are work product.

22 THE COURT: So, once I have reviewed the log I will
23 make a decision about whether or not I need to hear from the
24 parties and if I do, we might be able to deal with it over the
25 phone rather than having folks come in. Okay. So, I think

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1 that deals with those requests, 10, 11, and 13.

2 The parties agree with regard to that?

3 MS. PERSINGER: Yes, your Honor.

4 MR. SHOLDER: Yes. Thank you, your Honor.

5 THE COURT: Next I have request no. 5 which is copies
6 of all model releases signed by you from January 1st, 2004, to
7 the present. Let me ask this, just as a practical matter from
8 plaintiff. I know -- well, let me ask first. My understanding
9 is that your client has produced all of these documents that
10 she currently has in her personal possession.

11 Is that correct?

12 MS. PERSINGER: Yes; to my knowledge.

13 THE COURT: Okay. And by two your knowledge your
14 client has informed you that these are the only ones she was
15 able to find?

16 MS. PERSINGER: That's correct.

17 THE COURT: Okay.

18 MS. PERSINGER: She did, during the deposition, she
19 mentioned some model releases for hair shows that she signed
20 recently and so I have reached out to her regarding whether she
21 retained copies of those. I am waiting to hear back from her
22 on that but as far as the older model releases, she has
23 represented to me that she has produced everything she has.

24 THE COURT: Okay.

25 The next question I have is for the defense with

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1 regard to these particular, the model agencies at issue. Let
2 me ask this. This is for plaintiff's counsel, is there a
3 complete list of the different agencies that your client worked
4 for during the relevant time period?

5 MS. PERSINGER: I don't believe that defendants served
6 an interrogatory to that effect but they did ask her at her
7 deposition and they've also subpoenaed three of the agencies,
8 so they are aware of her U.S. agencies that she used during the
9 relevant time period.

10 THE COURT: Okay. So, let me ask this. To the extent
11 that you already -- this is for defense counsel -- already
12 subpoenaing the third-parties, I assume that part of those
13 requests, were they for documents? Is that accurate?

14 MR. SHOLDER: Yes. We subpoenaed several of her
15 agencies for documents and received productions from all but
16 one, I believe. But, as plaintiff's counsel noted, there are
17 several agencies, particularly with respect to certain niche
18 industries like hair and showroom-type jobs and European
19 agencies that we weren't aware of until the deposition.

20 THE COURT: Okay.

21 MR. SHOLDER: So, we haven't been able to secure
22 documents from them yet.

23 THE COURT: And is it fair to say the documents that
24 you have gotten from the third-parties so far, that I guess the
25 two of the three that you have subpoenaed, have you gotten the

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1 agent's model releases signed by the plaintiff?

2 MR. SHOLDER: No.

3 We have received contracts and we have received some
4 financial documents. There were no model releases in the
5 production and that may be a product of the fact that there is
6 a contract with the agencies and there may not have been a
7 model release involved in certain jobs. But, to my
8 recollection --

9 We didn't receive anything, right?

10 MS. LEWIS: No.

11 MR. SHOLDER: There weren't any model releases.

12 THE COURT: Okay.

13 So, as I understand it, you are still awaiting
14 production from one company; is that correct?

15 MR. SHOLDER: I believe so, your Honor.

16 THE COURT: And there are some additional agencies
17 mentioned during the deposition, plaintiff's deposition. I
18 guess the question -- and these are all agencies that the
19 plaintiff is not currently working for or with, right? Or am I
20 wrong about that?

21 MR. SHOLDER: They could be both. To the extent there
22 are European agencies that she either has worked with in the
23 past or is currently working with we aren't aware. There were
24 a few names that came up but they weren't ones that we heard of
25 before.

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1 THE COURT: Okay.

2 So, I guess with regard to any agencies that the
3 plaintiff is currently working with, I think that the plaintiff
4 should either, to the extent she has them, but should request
5 the releases from those agencies she is currently working with.
6 With the ones that -- and I don't know which ones those are, I
7 will leave that to counsel to discuss -- with regard to the
8 agencies that she is no longer working with, several things.
9 Number one. The defense should explore doing what you did with
10 the others, in other words third-party subpoenas. I mean, for
11 any number of reasons but it is not clear to me, necessarily,
12 that, because, again, I don't know the ins and outs of the
13 agreements that the plaintiff may have had with these entities,
14 but that there would be any continuing obligation of the
15 agencies to the plaintiff. I just don't know. So, I would
16 direct that you seek subpoenas with regard to those. One
17 caveat. If some of those are in fact European, in other words
18 they have no connection to the United States and there is no --
19 and therefore any subpoena would have to be done, I think,
20 although I am not sure, through the Hague Convention, with
21 regard to those I would direct that the plaintiff -- and again
22 I don't know whether she is entitled to them or not -- but that
23 the plaintiff make a request to get copies of the model
24 releases from those agencies to the extent that they have such
25 documents.

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1 Let me ask plaintiff's counsel. I don't know how many
2 of the agencies may be European or not but --

3 MS. PERSINGER: Your Honor, I'm not entirely sure
4 either but I just don't believe that those documents are really
5 relevant to this case because they're going to be governed by
6 different laws and they have different sort of industry
7 standards over there and she is doing completely different work
8 when she is over there. I don't see how it is relevant to the
9 issues here regarding the model release that was signed.

10 THE COURT: Again, and I understand that, but absent
11 me knowing which country it is and what the law is in those
12 countries, I think that -- and the potential overlap between
13 what the law is here and there, I'm not going -- I'm going to
14 direct the request be made and we will see whether or not --
15 again, I am not at all ruling that those documents would be
16 admissible. They all would be produced with the understanding
17 that they're subject to further objection concerning as to
18 their relevancy.

19 Okay?

20 MS. PERSINGER: Does that also include she does, like,
21 different type of work like showroom work which is basically
22 in-person modeling of designer dresses; there is no
23 photographs, no images that result from that. Do I include
24 that type of work?

25 THE COURT: No. My, again, since this deals with

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1 photographic images and use of photographic images, it would
2 not, in my mind, deal with her engagement to in-person
3 modeling, whether it is runway or other types of modeling.

4 Okay. Next I have, which is from the second RFP,
5 request no. 1, which are all contracts, agreements, licenses,
6 or releases between plaintiff and any modeling agency, talent
7 agency, employment agency, and such.

8 Similarly, let me ask with regard to these entities,
9 were documents requested of these agencies?

10 MS. PERSINGER: I believe plaintiff requested of her
11 directly former agency, the one right before the one she is
12 represented by now and I believe we did produce the agency
13 contract for that agency but I don't believe her other prior
14 agencies that she was able to request.

15 THE COURT: Okay. Let me ask this. Were those
16 agencies identified during either in an interrogatory or prior
17 to the deposition?

18 MS. PERSINGER: During deposition. I believe these
19 documents were produced in response to the subpoenas because we
20 received all the copies of the documents produced in response
21 to the subpoena and I am pretty sure that her contact with each
22 of the agencies was produced.

23 THE COURT: Okay. Because I think my ruling would be
24 similar to the last ruling. So, I don't know what the scope of
25 these, whether they're different entities involved here, but my

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1 ruling would be the same with regard to here, with regard to
2 these entities, in other words pursue the third-party subpoena
3 route. To the extent that some of them are foreign entities, I
4 will make the request that plaintiff make a request to those
5 entities. Again, I don't know what the relationship is and
6 whether or not, what the response will be. And then, once that
7 is done, if the plaintiff is unable to get them because for
8 some legal reason or there is refusal then defense counsel, you
9 need to decide whether or not you want to pursue getting those
10 documents using, I think, using the legal method available to
11 obtain documents from a foreign entity. Okay?

12 MR. SHOLDER: Yes. Thank you, your Honor.

13 THE COURT: All right.

14 Next. So, it is defendant's first request and it's
15 request no. 22, which is all documents reflecting payments to
16 you for modeling work between 2004 and the present.

17 In reviewing this request I had a question for
18 plaintiff and it concerns -- and I have not admittedly gone
19 back to look at the complaint -- I almost said indictment, I
20 guess I have the prior criminal case on my mind -- but during
21 what period is the plaintiff seeking damages?

22 MS. PERSINGER: She is seeking damages for the
23 photographs that were taken in 2005 and then also in 2009.

24 THE COURT: Okay. So, let me ask the defendants with
25 regard to the request, what's the relevancy, then, if the

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1 damages are limited to that period? What is the relevancy to
2 obtain payment records that are substantially outside of that
3 time frame?

4 MR. SHOLDER: Your Honor, I will just first say that I
5 assume that opposing counsel meant 2004 and opposed to 2005
6 because the photo shoots are 2004 and 2009. But, also, the
7 ruling on the motion to dismiss essentially wiped out the 2004.

8 THE COURT: 2004, yes.

9 MR. SHOLDER: With respect to anything after 2009, the
10 advertisement at issue didn't appear until, I believe, 2016,
11 and the plaintiff's images appeared on the Getty Images website
12 somewhere in the, I think, 2010 or 2011 area; I don't remember
13 exactly off the top of my head. But, if the claims involve
14 use, purportedly unlawful use by displaying on the website and
15 then another purportedly unlawful use by appearing in the ad,
16 her income should be relevant during those periods, too, to
17 show if there was any impact.

18 MS. PERSINGER: If I might, your Honor?

19 THE COURT: Yes.

20 MS. PERSINGER: It is our position that, you know,
21 these jobs and her picture couldn't have been taken for that
22 campaign in the same manner currently, so what is relevant is
23 what she was making at the time the photos were taken. And
24 modeling depends heavily on the model's age and appearance and
25 she doesn't look the same now and she is not working the same

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1 type of jobs now as a result because she is a little bit older.
2 So, what she was making, what she was earning around the time
3 the photos were taken, it is actually going to be relevant to
4 what she should have been paid for those photos.

5 THE COURT: Well, and I don't know the answer to this,
6 I don't know if she were to, if she independently had these
7 photos and she went out to market them whether or not -- I
8 mean, if what you are saying is it would be based on the fact
9 that she was, I don't know, however old, say, 30 at the time of
10 the photos but she is now selling them when she's 40 -- I mean,
11 I guess what I am saying is the following. I don't know where
12 this is going to lead but if in fact we limit, if I limit the
13 time period here, it could limit the damages on the other end.
14 Again, I don't know how, whether the parties intend on
15 retaining experts or not and, again, obviously I am getting way
16 ahead of myself but what I am saying is it might lead to
17 precluding the plaintiff for seeking damages for certain
18 periods.

19 Again, because I haven't made a ruling -- I understand
20 what you are saying but I haven't made a ruling on that, we
21 haven't decided that. So, I guess -- well, this is what I am
22 going to do. Because of that, I am going to allow for these
23 documents for the period, again, in light of the ruling with
24 regard to the 2004 shoot, are those damages, is it your
25 position that those damages are still at issue or are they out

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1 of the case? Because I basically, as part of the motion to
2 dismiss, decided that issue.

3 MS. PERSINGER: Well, as defense counsel mentioned
4 earlier, there is some confusion as to when the model release
5 was actually signed. And so, it is our position that if it was
6 in fact signed in 2009, then the model release, per your
7 Honor's ruling, would only apply to that set of photos, in
8 which case the 2004 discovery would remain relevant. I know it
9 is defendant's position that if it was signed in 2009 it would
10 apply to both sets of photos. But, because the contract was
11 blank and there was no description of shoot or no visual
12 representation of shoot when the plaintiff signed it, I don't
13 believe it is reasonable for it to have even assigned in 2009
14 to apply to both sets of photographs.

15 So, there is a question outstanding as to, per your
16 Honor's ruling which, I guess, which set of photographs would
17 have been released.

18 MR. SHOLDER: Your Honor, may I?

19 Just for the record I want to say that based on the
20 witness statements that I mentioned earlier, there is, and
21 likely will be if we take depositions, there will be testimony
22 that the understanding and the discussion at the time was that
23 both shoots would be covered. So, I think the evidence will
24 show that if the release was signed in 2009, it released all
25 claims with respect to all images in both photo shoots.

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1 THE COURT: But with regard to this issue, I'm going
2 to, and by "this issue" I am referring to request no. 22 of
3 defendants with regard to their first document request, that it
4 would be payment records from 2009 to 2016. And I understand
5 the argument raised with regard to that that's not the way
6 damages will be calculated because as the plaintiff, or as
7 models get older, what they can garner for the photographs
8 decreases. But I think, again, I have not reached that issue.
9 And so, I will direct that those documents be produced, without
10 prejudice to any arguments later on that that's not an
11 appropriate -- the documents aren't appropriate for inclusion
12 in the calculation of damages.

13 MS. PERSINGER: Your Honor, just to clarify.

14 Would that only apply to payments that reflect jobs
15 that resulted in images like we made the distinction before
16 that that would be in-person modeling or things like that?
17 Does that same restriction apply to this request as well?

18 THE COURT: Let me hear from the defense -- yes, it
19 applies. I don't think there is any -- I can't think of any
20 basis why -- I mean, obviously there may, and I don't know,
21 there may be some connection a model might garner a certain
22 amount but there may not be. I don't know. I mean, in other
23 words there might be models, I guess, whose images are taken of
24 their face who may not garner as much when they're doing runway
25 work. So, no, it only applies to images.

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1 MS. PERSINGER: Thank you, your Honor.

2 MR. SHOLDER: Your Honor, would this apply to the
3 agency payment records as well, including with respect to
4 foreign agencies? Or would that be covered by the prior
5 discussion?

6 THE COURT: I was, and again, this is an assumption I
7 was making with regard to the earlier request, I had thought
8 that the agency -- well, it would -- oh, you mean with regard
9 to payments with regard to those agencies?

10 MR. SHOLDER: Yes. Correct.

11 THE COURT: I think this request, stand alone I think
12 would include, again, the images but, again, from 2009 to 2016
13 and it would cover those entities.

14 MR. SHOLDER: Thank you.

15 THE COURT: Okay. I'm sorry. My law clerk has
16 reminded me that there was another issue with regard to the
17 information that might be contained on these documents.

18 Number one, to the extent that the protective order
19 already in place doesn't cover the personal identifying
20 information or other sensitive information, I would ask the
21 parties to meet and confer about whether or not those materials
22 could be redacted and/or produced in some other limited
23 distribution fashion whether that's attorneys eyes only or
24 otherwise. I don't know what the nature of that information
25 would be, but it seems to me that the protective order either

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1 will cover it or you can amend the protective order or agree
2 that certain types of information can be redacted. Okay?

3 MS. PERSINGER: Yes.

4 MR. SHOLDER: Yes.

5 THE COURT: All right.

6 Next, with regard to, I think this is plaintiff's
7 first request to the Getty defendants, and this is request
8 no. 6, so all communications between the defendants and Corbis
9 related to the images including communications relating to
10 model releases for the images, and there is also request no. 12
11 here. And I guess the question I have is why shouldn't I
12 reference the complaint for consideration as to what the scope
13 of discovery should be with regard to these requests?

14 MS. PERSINGER: Was that directed to me, your Honor?

15 THE COURT: It is. I'm sorry. Yes.

16 MS. PERSINGER: Well, I think even if you do reference
17 the complaint, I think that these images clearly qualify.
18 Getty is now offering them for license, they were taken by Bill
19 Diodato. Some of the putative class members that we have
20 identified in interrogatories have their photos from the same
21 identical photo shoot, on initially the website but now the
22 entire collection is on Getty's. So, basically, if we didn't
23 get access to the documents related to these images we would
24 have some of the images from the photo shoot and not others
25 which is sort of an inconsistent result. And they're also, I

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1 assume, subject to the same model releases so they would be
2 under the same set of facts for each of the putative class
3 members for that photo shoot.

4 THE COURT: And just so the record is clear, when you
5 say other websites, you are referring to the Corbis website?

6 MS. PERSINGER: Yes.

7 THE COURT: And then, after Corbis was sold, my
8 understanding is Getty then obtained the rights to or license
9 certain of those photos from the new acquiring entity which is
10 Visual China Group?

11 MS. PERSINGER: I believe that's correct.

12 THE COURT: Okay. Let me hear from the defendants
13 with regard to this.

14 MR. SHOLDER: Sure, your Honor.

15 I am likely going to reference back to the argument
16 that is in my letter. I think it is pretty clear that the
17 Corbis images don't fit within the clear definition of the
18 class. They were not available at the time the complaint was
19 filed, Corbis is not mentioned anywhere in the complaint,
20 Visual China Group is not mentioned anywhere in the complaint
21 to the best of my knowledge. These images were not conveyed to
22 Getty Images. They were not conveyed by Bill Diodato. Bill
23 Diodato submitted them to Corbis, Corbis was acquired by Visual
24 China Group, and Getty Images ultimately secured the right to
25 distribute certain images that used to belong to Corbis and now

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1 belong to Visual China Group. It is three steps removed from
2 anything having to do with the class as allegations and wasn't
3 even at issue when the complaint was filed, and we think it is
4 overbroad and it is expanding the scope of discovery to images
5 that, as plaintiff's counsel mentioned, are likely duplicative.
6 If they see models in both of these collections anyway they
7 know who their potential class members are.

8 MS. PERSINGER: They're not entirely duplicative,
9 though. They are differently different class members that are
10 clearly professional models. And, while it may be a few steps
11 removed in how Getty acquired them, they knew that these photos
12 were taken by Bill Diodato and, because there is overlap, they
13 knew that they fell within the allegation of the complaint as
14 being alleged to be unlawfully offered to license and they
15 still chose, under those circumstances, to go ahead and offer
16 them for license.

17 MR. SHOLDER: Respectfully, I think that's quite a lot
18 of assumptions in that allegation.

19 To the extent that there was an acquisition of the
20 rights to distribute a certain collection, there is no evidence
21 that Getty Images went through and said, well, those are the
22 Bill Diodato images and, hey, remember there is that complaint
23 out there? We are going to take those images along with the
24 rest of the Corbis collection anyway and distribute them
25 notwithstanding the complaint. I think that's completely

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1 implausible.

2 I can't say for sure, and obviously if there is a
3 sixth deposition for a Getty Images representative, that's
4 fine, and we can discover that, but at this point I don't think
5 it is improper, or properly within the scope of discovery.
6 And, Corbis and Visual China Group are not in this case and
7 maybe they should be. I don't know.

8 THE COURT: Well, I think I understand the issue and I
9 am going to, at this stage, I'm not going to require the
10 production of information related to that. Obviously, if
11 information develops either at a subsequent time either through
12 a 30(b)6 witness who testifies about how these are acquired and
13 what legwork went into that and what knowledge Getty Images had
14 at the time of what the images it was -- I'm going to say
15 purchasing but licensing at the time -- I am obviously not
16 precluding revisiting the issue at a later date. But, for now,
17 I'm not going to require the production of these materials
18 related to this request 6 and request 12.

19 Okay. And obviously this ruling applies to both
20 defendants; Getty Images and Diodato.

21 MR. SHOLDER: Yes. Thank you, your Honor.

22 THE COURT: Next is I guess the royalty images, for
23 lack of a better term. Here again I have reviewed the points
24 behind the parties. We did have, I think, a rather extensive
25 discussion and exchange of letters with regard to the prior,

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1 the motion to compel, and here I do think this will be a
2 broadening of my prior order and therefore I am going to
3 decline at this time to extend the discovery with regard to the
4 royalty-free images that have been requested by plaintiff.

5 Now, next is plaintiff's first, I guess it is request
6 no. 1: All model releases for the images from plaintiff's
7 first request. Here I think that the -- and this is I guess
8 specifically with regard to the Diodato defendants make the
9 argument that it is burdensome or duplicative, but in light of
10 the allegations in the complaint and the fact that it's not
11 clear to me that despite the fact of Diodato's size, these
12 documents appear to be directly relevant and in light of the
13 allegations in the complaint, I am going to direct that these
14 documents be searched for and produced, and that any
15 duplication I find doesn't warrant not having the documents
16 search for and produced.

17 MR. SHOLDER: Your Honor, can I ask for some
18 clarification with respect to what's the universe of documents
19 we are talking about? Because at this point we have produced,
20 I believe, 550 images which I have comprised I am not sure how
21 many hundreds of model releases, but Bill Diodato and Diodato
22 Photography have engaged in a search for model releases and
23 because we had a discrete set of 13 or so putative plaintiffs
24 not including the named plaintiff and those have been produced,
25 it just seems to me to be unmanageable. I don't know how he

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1 would do that. I don't think he has copies of these files
2 onsite. To some degree they haven't been kept because he
3 usually discards files after five or seven years and relies on
4 the fact that he submitted the final versions to Getty Images.

5 I am just concerned that he is essentially going to
6 shut his business down to go and spend weeks in a storage unit
7 somewhere. I don't know how to kind of mitigate the harm.

8 THE COURT: Well, again. I don't know how he keeps
9 these documents. I understand what you are saying to me but in
10 light of the allegations here -- I know that certain of them
11 have been produced by the Getty defendants, but that doesn't
12 necessarily obviate the fact that to the extent that there are,
13 because as I understand it, there are some allegations that,
14 and I understand that you are saying that the final ones or
15 whatever was communicated to Getty, but I think plaintiffs are
16 entitled to actually see the documents from both sides.

17 I guess what I would suggest is the following: As it
18 stands right now, I don't think you made a record that is
19 sufficient to show that it is in fact overly burdensome, that
20 there is, in fact, and I don't think there has been a
21 sufficient record as to what actually, what searches have
22 actually been conducted.

23 The other thing I would add to that is you mentioned
24 that he doesn't keep the records for more than five to seven
25 years. Well, I hope that that practice has, with the filing of

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1 this lawsuit, stopped. So, by that I mean that there was a
2 freeze put in place with regard to the documents both in terms
3 of these documents but I was going to make this -- I was going
4 to make this comment in connection with the e-mails also which
5 we are going to discuss in a moment.

6 So, I will maintain my ruling, subject to the, and
7 whether it is through, and I don't know whether it seems like
8 it would probably be Diodato himself, I don't know whether
9 there is a Diodato 30(b)6 witness I guess is what I'm saying.
10 But, to my mind, it hasn't been established that this is
11 something that would be overly burdensome to the extent that
12 that would outweigh, in my mind, the plaintiff's right to get
13 this through discovery.

14 MR. SHOLDER: If I may, one last thing?

15 THE COURT: Yes.

16 MR. SHOLDER: I understand the rationale of wanting to
17 see if there are any changes between whatever hard copy might
18 exist and what was submitted to Getty Images, but I guess one
19 point that I wanted to raise was that I don't know that I see
20 the relevance given that the fraud claims are gone,
21 particularly with respect to this plaintiff and assuming, which
22 I am certainly not conceding that people had similar
23 experiences, there is no fraud so I don't understand and I
24 would argue that there is no relevance to whatever differences
25 there might be.

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1 I have put it on the record for whatever that is
2 worth.

3 THE COURT: All right. I am going to maintain my
4 ruling.

5 So, with regard to the next, we are going to
6 plaintiff's first request to the Diodato defendants and this is
7 communications and e-mails with models in the putative class.
8 I guess here again I have the same sort of reaction that I did
9 to the prior request. I don't believe that there has been, A,
10 I believe that these records -- and these are, I'm sorry,
11 defendants' request 3 through 4, 7, 16 and 17. I don't believe
12 that -- well, let me ask this question:

13 The defendants, in response, say that Diodato does not
14 generally e-mail models but, let me ask, are these requests
15 limited just to the e-mails between Diodato and the models or
16 Diodato, do they include e-mails from and to Diodato to the
17 agencies that may be relate to the models? Do you understand
18 what I'm saying? Because, as I understand the argument, the
19 defense is saying we usually communicate with the agencies, we
20 never communicate with the models. But, to the extent that you
21 are communicating with the agencies about the very models that
22 we are talking about, do the requests include that?

23 MS. PERSINGER: Yes, your Honor. The requests are
24 communications relating to model releases for the images and
25 then relating to licensing or use of the images and concerning

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1 providing the images to Getty. Things like that. So, it is
2 really just topical rather than the recipients of the e-mails.

3 THE COURT: So, I guess what I would say is the
4 following. That it may be that the search encompassed that, I
5 don't know, but I think with regard to this, and again my
6 reaction is similar to the prior request, is that right now
7 there hasn't been a record that (A) this would be duplicative
8 or overly burdensome. I mean these are e-mails, they're
9 electronic records. I don't know what search was conducted for
10 these materials. Well, let me ask, was this something where --
11 well, do you have an understanding, how was the search
12 conducted for these e-mails? And by that I mean was it just
13 simply a request to your client or was it a situation where
14 computers were imaged and other documents are received and then
15 your law firm did some form of word search?

16 What sort of search was performed here?

17 MR. SHOLDER: Your Honor, to my recollection it would
18 be the former. We spoke with our client, explained to him what
19 would be responsive, and I believe the search that was done was
20 to try to find e-mails referencing the plaintiff or the
21 potential class members that were referenced in the answer to
22 interrogatory no. 1.

23 THE COURT: Okay. So, what I guess what would I
24 direct is the following: Is that that search, to the extent it
25 incident include sort of agency communications, that that be

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1 expanded to include that because it seems to me that that is
2 within the ambit of these requests. In addition, I think you
3 need to drill down a little bit more as to how, what exactly
4 your client did to actually get to these documents, where he
5 searched, and whether there are caches of e-mail and the like
6 in other locations. So, for example, let's say that on his
7 personal computer, on the computer he uses at work he had a
8 habit of deleting certain e-mails up until -- I'm not saying
9 that there is any spoliation here but up until the time he got
10 a hold notice but that he uses some other platform, whether it
11 is Google, that would have those. I think you need to, at a
12 minimum, you need to disclose that, what was done. But,
13 certainly, I would like you to drill down a little bit more as
14 to how he conducted the search. I understand that you gave him
15 certain instructions but I think that perhaps a little bit more
16 is required and it should be expanded to include the agencies
17 also.

18 MR. SHOLDER: Yes, your Honor.

19 THE COURT: Okay.

20 MS. PERSINGER: I have one remaining question on the
21 e-mail communications.

22 THE COURT: Yes.

23 MS. PERSINGER: I believe your prior order already
24 ordered the defendants to produce documents relating to the
25 rights managed photos and those documents would include

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1 communications like e-mails. And so my question is or my
2 position is I don't think it is enough to search only the
3 specific potential class members that we listed in response to
4 interrogatories. I think it should also include the models for
5 which the images which have been ordered to be produce and the
6 related documents to that. It is our position that those have
7 already been ordered produced, those communications.

8 THE COURT: I mean to the extent that my, in other
9 words there were things that were ordered produced that would
10 be encompassed within that? Because I just don't know, I guess
11 I'm not sure exactly what you are referencing but I think to
12 the extent that what you are saying is that my prior order,
13 that these requests would be relevant in connection with the
14 documents I indicated should be produced in my prior order that
15 then they should be produced with regard to this. In other
16 words, you are saying that the prior order with regard to
17 the -- I'm sorry. It was rights?

18 MS. PERSINGER: Managed, I believe.

19 THE COURT: Okay, that those e-mails would be
20 encompassed in these requests.

21 MS. PERSINGER: Yeah. What I'm saying is because they
22 had to produce the documents relating to those models, I think
23 the relevant communications relating to those models would also
24 be responsive to the earlier order from the Court, and then
25 also they're responsive to the request we are addressing now.

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1 So, I think Bill Diodato should have to, if he is doing
2 specific searches, not be limited to those 13 people we
3 identified but have to search for communications with the
4 models that their images have been, in our view, determined to
5 be relevant and produced.

6 THE COURT: I think that's right. So, to the extent
7 that hasn't already happened, that should occur also.

8 MR. SHOLDER: Yes, your Honor.

9 THE COURT: So now to plaintiff's second request to
10 the Diodato defendants and these are requests 12, 13 and 15.

11 As I understand it is request 15, the Diodato
12 defendants have indicated they produced the contributor
13 agreement. So, is request 15 still an issue? Or not?

14 MS. PERSINGER: Let me pull that up?

15 THE COURT: Sure.

16 MS. PERSINGER: Yes, that's all it covered. That
17 should be -- I'm sorry. Mr. Sholder, did your client actually
18 go ahead and produce that? I don't know that I have seen it
19 come across.

20 MR. SHOLDER: It had been produced by Getty Images so
21 I understand, per our discussion about the model releases, the
22 Court's reasoning behind a compelling production of both sets.

23 THE COURT: Yes.

24 MR. SHOLDER: But the contributor agreement is what it
25 is. I think it wouldn't be a problem if I could have

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1 Mr. Diodato send me a copy of it and produce another copy of
2 it.

3 THE COURT: Let me ask is this. Is there any
4 allegation -- is there any issue with regard to the, again, do
5 you need to get the document from the Diodato defendants also?
6 And, by "need," in other words is there some belief that it
7 could be somehow different in some way?

8 MS. PERSINGER: I don't believe so, your Honor, unless
9 there is any handwritten notes or interpretations on there. I
10 think those would be relevant and we would be entitled to
11 those, but if it is just an identical copy of what Getty
12 already produced I know that we really don't need it.

13 THE COURT: Why don't you see? And maybe your client
14 has it electronically but if he has a hard copy, which for
15 whatever reason he has made notations on it, that should be
16 produced. But, otherwise, it need not be produced.

17 So, now request no. 12 and 13, and here again I guess
18 it is a similar sort of position that the defense is taking
19 that there is a burden involved but, again, I don't believe (A)
20 has an actual search been attempted for 12 and 13? Do you
21 know?

22 MR. SHOLDER: I don't know off the top of my head,
23 your Honor.

24 My recollection, when last speaking with the client
25 about this, is that it is essentially reflected in our letter

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1 and that he keeps these documents for a limited period of time
2 and obviously there is a litigation hold in place

3 THE COURT: Yes.

4 MR. SHOLDER: But for documents of model releases from
5 2003 and 2004, I mean, he is a professional photographer.
6 Model releases are extremely common and I don't think he has
7 those from that long ago. I can certainly confirm with him.

8 THE COURT: This is what I will say in terms of that
9 because, again, I don't believe that there has an been an
10 adequate record made that this would be overly burdensome to
11 Diodato, in addition whether or not it would be overly
12 burdensome to produce more recent copies of the documents as
13 opposed to going all the way back which may require more
14 effort.

15 So, I'm going to require the production subject to the
16 defendant's ability to make a further record that in fact the
17 burdens of producing them outweigh, in other words the
18 proportionality that the burdens of producing outweigh the
19 relevancy of these documents. But, I will also say that -- I
20 mean that may require, that that may require Mr. Diodato's
21 deposition as a 30(b)6 witness or someone's deposition as a
22 30(b)6 witness. I don't know. I mean, it sounds as if he is a
23 sole practitioner, basically, and maybe he has a staff, he has
24 some staff, but the staff may not be familiar with these sorts
25 of issues.

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1 MR. SHOLDER: Yes, I think he probably would be the
2 30(b)6 witness. My concern though, your Honor, is that the
3 deposition of Mr. Diodato, whether as an individual or a
4 corporate representative, is not under our control.

5 THE COURT: Yes.

6 MR. SHOLDER: I am not going to call my own witness
7 for a deposition. I suppose I could if I had to, but at some
8 point we were discussing scheduling of depositions.

9 THE COURT: Well, to put a finer point on it, it is
10 your burden to show that it is overly burdensome. So, while I
11 understand you have to do that in some way so I don't know how
12 you would do that and I know obviously it is not, you wouldn't
13 call your own witness but whether or not -- so, I won't
14 elaborate on how you should proceed in that way but it is your
15 burden to do that. My ruling is that they should be produced
16 and subject to the ability to demonstrate that it is in fact
17 overly burdensome and under proportionality under the civil
18 rules you shouldn't have to produce them.

19 MR. SHOLDER: Yes, sir.

20 THE COURT: Okay? All right.

21 Oh. I think that was the last one. Did I miss
22 something? I think that covers it.

23 MR. SHOLDER: Your Honor, there is our RFP no. 5 we
24 actually had on our list.

25 THE COURT: I thought I did that second. That was the

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1 copies of model releases.

2 MR. SHOLDER: This is documents regarding monetary
3 amounts and other consideration provided to you concerning the
4 images.

5 THE COURT: What letter was that in?

6 MR. SHOLDER: I might be wrong, your Honor. Bear with
7 me, please?

8 THE COURT: Sure.

9 MS. PERSINGER: I thought that was RFP 22 relating to
10 the compensation.

11 MR. SHOLDER: I have no. 5 but it may well be this was
12 an extraneous entry on my sheet here and we may have resolved
13 this one outside the motion to compel process.

14 THE COURT: Okay. Why don't you, if in fact there is
15 something that I missed that was in the letters, just let me
16 know. We can hop on the phone, I can deal with that one fairly
17 quickly.

18 Let me ask, is there anything else that we need to
19 take up at this juncture? From plaintiff's counsel?

20 MS. PERSINGER: I don't believe so, your Honor. I
21 don't have anything.

22 THE COURT: From the defense?

23 MR. SHOLDER: No, your Honor. I think that's it.

24 THE COURT: Okay. I have obviously given you my oral
25 rulings. I think, to be sure, you may want to order a copy of

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1 the transcript but I think we have covered everything.

2 Is there anything else? Nothing?

3 MR. SHOLDER: No, your Honor.

4 THE COURT: All right. We will stand adjourned.

5 Thank you very much for coming in. I think we were relatively
6 efficient.

7 Thank you very much. Have a good weekend.

8 o0o